

1 IN THE UNITED STATES DISTRICT COURT

14:01:20

2 FOR THE DISTRICT OF ARIZONA

3 Barry Lee Jones, ) 4:01-cv-00592-TMB  
4 Petitioner, )  
5 vs. )  
6 Charles L. Ryan, et al., ) Tucson, Arizona  
7 Respondents. ) March 2, 2018  
 ) 2:01 p.m.  
-----)

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10 BEFORE THE HONORABLE TIMOTHY M. BURGESS, DISTRICT JUDGE

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12 Transcript of Proceedings  
Oral Argument

13

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15

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# 1 PROCEEDINGS

2 (On the record at 2:01 p.m.)

3 THE COURT: Good afternoon.

4 MR. BRACCIO: Good afternoon, Your Honor.

5 THE COURT: So I take it you got the questions. And 14:01:28

6 so this is my proposal as to how we proceed. I've got my timer 14:01:33

7 set on 45 minutes for each of you. My thought is petitioners 14:01:42

8 will go first. You can reserve some time for rebuttal if you 14:01:47

9 want. Do you want to manage your own clock or would you like 14:01:52

0 me to give you a warning when you reach a particular point? 14:01:55

1 MB. SANDMAN: Your Honor, maybe around 30 minutes. I 14:01:59

2 do want to reserve some time. So if I start to go over -- 14-02-04

THE COURT: So you want to use 30 minutes. You want a 14-02-07

4. Warning at the 15-minute mark is that what you're saying? 14:03:10

5 MR. SANDMAN: No. I'm sorry, Judge. At the 30-minute 14:03:11

<sup>6</sup> mark. I would like a warning if I am still -- 14-02-15

THE COURT: I think we've said the same thing in

<sup>9</sup> See also the discussion of the relationship between the concept of the "self" and the concept of "subject" in the work of Michel Foucault.

1 have.

14:02:35

2 I do want to -- because I just provided those questions to  
3 you and did not put them on the record, I am going to just read  
4 the questions now so that they're questions that are on the  
5 record.

14:02:36

14:02:39

14:02:45

14:02:50

6 So I have, first, two questions for both parties.

14:02:51

7 One: Does the trial record that the prosecutor argued to  
8 the jury that even if they didn't find Jones guilty on counts  
9 other than count four that the jury could nonetheless find  
10 Jones guilty on count four, and, if so, on the basis of what  
11 evidence?

14:02:55

14:02:59

14:03:04

14:03:09

14:03:14

12 Question two: Explain or further elaborate on how law  
13 enforcement's investigation is relevant or irrelevant to the  
14 ineffective assistance of counsel claim.

14:03:14

14:03:19

14:03:23

15 And then three questions each for each side.

14:03:25

14:03:28

16 First, for petitioners:

17 One, assuming Jones wasn't involved in causing any of  
18 Rachel's injuries, and assuming others put him on notice that  
19 she was ill on May 1, why wasn't he on notice that she needed  
20 to go to the hospital?

14:03:30

14:03:34

14:03:37

14:03:43

21 Two: Given that Jones does not dispute that he saw the  
22 Lopez twins at the Choice Market on May 1 -- and I may need  
23 some clarification on that issue -- why wasn't defense  
24 counsel's investigation into the Lopez' twins testimony  
25 minimally competent?

14:03:44

14:03:49

14:03:55

14:04:01

14:04:05

1       And three: Can you please respond to respondent's argument 14:04:06  
2       that the Court should presume the trial counsel did not follow 14:04:10  
3       up with Dr. Keen after August 4, 1994, for strategic reasons? 14:04:14

4       And then for respondents, three questions: 14:04:20

5       One: How do we know, given Arizona's non-unanimous jury 14:04:22  
6       law, that any trial juror convicted Jones of felony murder 14:04:27  
7       based on count four as the predicate? 14:04:32

8       Two: Does count four satisfy the Enmund -- I think it 14:04:38  
9       was misspelled on the sheet that I handed you. It's 14:04:44  
10      e-n-d (phonetic). -- Tison standard? 14:04:47

11       And finally, three: Why was it not deficient performance 14:04:51  
12       of Jones' post-conviction counsel to request funding for an 14:04:58  
13       investigator under the wrong rule and without supporting that 14:05:04  
14       request? 14:05:08

15       So, those are the questions for counsel, and I am ready 14:05:09  
16       when you are. 14:05:16

17       MR. SANDMAN: Your Honor, I think what I'd like to do 14:05:39  
18       is try to address your questions first. And I may have some 14:05:41  
19       things to interject while answering those questions, but I 14:05:46  
20       think I'd like to work my way through those. 14:05:50

21       THE COURT: Sure. 14:05:52

22       MR. SANDMAN: Starting with question one, the answer 14:05:53  
23       is no to question one. 14:05:55

24       In other words, the prosecutor never argued to the jury 14:05:58  
25       that if they didn't find Jones guilty on the counts other than 14:06:02

1 count four that the jury could nonetheless find him guilty on 14:06:06  
2 count four. 14:06:10

3 The argument to the jury was that Mr. Jones had failed to 14:06:10  
4 provide medical care or take Rachel to the hospital to conceal 14:06:19  
5 his own wrongdoing as the rapist and person who assaulted 14:06:22  
6 Rachel. So the argument was Mr. Jones is the perpetrator, he 14:06:28  
7 wanted to conceal his wrongdoing, and therefore withheld care. 14:06:35  
8 So that was the argument. There wasn't any kind of 14:06:41  
9 alternative. 14:06:44

10 Number two, explain or further elaborate on how law 14:06:45  
11 enforcement investigation is relevant or irrelevant. 14:06:51

12 You know -- 14:06:55

13 THE COURT: That's a pretty big question. 14:06:56

14 MR. SANDMAN: It is. So let me just digress for a 14:06:59  
15 moment to talk about the overall ability to impeach the state's 14:07:02  
16 case, including the law enforcement investigation. 14:07:07

17 But let's start with Dr. Howard, who testified at 14:07:10  
18 Mr. Jones' jury trial. He testified that all of the injuries 14:07:18  
19 took place or gave -- basically provided testimony so the jury 14:07:22  
20 would conclude that all the injuries took place on the day 14:07:27  
21 prior. 14:07:32

22 Dr. Howard had testified at the Gray trial just only a 14:07:34  
23 couple weeks earlier, and he testified there in response to a 14:07:37  
24 question: How long would the scalp injury have been painful to 14:07:42  
25 Rachel? He said several days. 14:07:47

1       So we know in front of the Gray jury he is indicating that 14:07:49  
2       that wound to the scalp had been there for several days before 14:07:55  
3       her death. Because obviously if it's painful, for several days 14:07:59  
4       it exists. 14:08:02

5                  THE COURT: Couldn't he have been talking, speaking 14:08:03  
6       hypothetically, that type of wound could be painful for several 14:08:06  
7       days? 14:08:08

8                  MR. SANDMAN: He wasn't asked a hypothetical question. 14:08:10  
9       It was Rachel's -- this wound to this child. We pin cite that 14:08:12  
10      in our brief. 14:08:17

11                 He was also asked on cross-examination at the Gray 14:08:18  
12      trial questions about the timing of the small bowel injury, and 14:08:22  
13      he said that the injury was most consistent with infliction 24 14:08:25  
14      hours prior to death. Which, of course, is prior to the Sunday 14:08:29  
15      afternoon when Mr. Jones had sole care of her. 14:08:35

16                 He then was asked the same question by the prosecutor 14:08:38  
17      at the Jones trial in front of that jury, and the question 14:08:42  
18      was -- and this was at Page -- it's Exhibit 47 at Page 148: 14:08:48  
19      What is the most consistent with when this blow to the small 14:09:00  
20      bowel would have occurred to Rachel? 14:09:05

21                 There is only one truthful answer to that, given what 14:09:07  
22      he's testified to two weeks earlier: It was most consistent 14:09:10  
23      with 24 hours. But he doesn't say that, and he ends up 14:09:13  
24      testifying that the injuries were consistent with the afternoon 14:09:17  
25      prior, when the child was with Mr. Jones. 14:09:20

1           And the same thing with the vaginal injury, you can       14:09:24  
2 work through things.   14:09:28

3           So there's that impeachment of the state's case.       14:09:28

4           Now, they have a star witness at the trial, Becky, who 14:09:33  
5 is Rachel's sister, who testifies that Mr. Jones went off on 14:09:39  
6 three trips with Mr. Jones on Sunday afternoon and that she was 14:09:46  
7 fine after the first two trips. But then Becky says: I didn't 14:09:52  
8 see her after the third trip. So that was the vehicle, that 14:09:55  
9 third trip was the vehicle for when this assault occurs.       14:09:59

10          Once again -- and by the way, you know, Mr. Bruner,      14:10:06  
11 the trial lawyer, had all the impeachment available to impeach 14:10:11  
12 Dr. Howard with his changes in testimony. He also had in his 14:10:15  
13 file Becky's prior statements, including her sworn testimony at 14:10:20  
14 her mother's trial, the Gray trial, two weeks earlier, where 14:10:23  
15 she said: On each and every occasion my sister went off with 14:10:27  
16 Mr. Jones twice, she came back fine both times.               14:10:30

17          Now, we all know she wasn't fine because she had a      14:10:35  
18 small bowel injury that no one knew about, and she was dying, 14:10:39  
19 would die from that in a number of hours. But the point is, is 14:10:42  
20 that there isn't any opportunity for this crime to have 14:10:44  
21 occurred if she is impeached with those prior statements.      14:10:47

22          Then we get to Detective Pesquiera and the law        14:10:54  
23 enforcement. And we know, number one, when she testifies in 14:10:59  
24 front of the grand jury, she is asked, you know, questions 14:11:02  
25 about when Mr. Jones would have had the opportunity to do this, 14:11:06

1 and she is asked how did Rachel look after the second trip in 14:11:11  
2 the van with Mr. Jones on that Sunday. And she had Rachel -- 14:11:14  
3 excuse me -- Becky's interviews. In fact, she was using the 14:11:22  
4 interview to Detective Downing, that Becky gave to Detective 14:11:26  
5 Downing, to guide her grand jury testimony. And rather than 14:11:30  
6 telling the grand jury the truth about what Becky saw 14:11:33  
7 concerning Rachel after the second trip, which is Rachel was 14:11:39  
8 absolutely fine, she said, untruthfully: Oh, Becky never saw 14:11:43  
9 her after the second trip. 14:11:47

10 That wasn't true. So she was never impeached with 14:11:50  
11 that. And she was never impeached with respect to what 14:11:58  
12 I would consider a fatal flaw in her entire investigation. 14:12:04

13 You know, she comes to the conclusion that these injuries 14:12:09  
14 would have been inflicted on Sunday afternoon, some 14:12:12  
15 short hours before the child died, based on her own assumption. 14:12:17

16 THE COURT: Well, didn't she interview...was it a 14:12:22  
17 Ms. Toley (phonetic)? 14:12:29

18 MR. SANDMAN: Ms. Tafe? 14:12:30

19 THE COURT: Tafe. Tafe. And didn't Ms. Tafe tell her 14:12:32  
20 that she thought that Rachel showed signs of illness on the 14:12:37  
21 30th? 14:12:41

22 MR. SANDMAN: On Saturday. 14:12:42

23 THE COURT: Correct. And my question then is this: 14:12:44  
24 Was that in her report? 14:12:47

25 MR. SANDMAN: Yes. 14:12:52

1 But when I questioned -- I believe the answer is yes. 14:12:56

2 And when I questioned Ms. Pesqueira about that, she said: 14:13:00

3 Well, I disregarded that because I knew this assault happened 14:13:05

4 on Sunday, and so I assumed that Ms. Tafe was mistaken. 14:13:11

5 So why does she assume -- she assumes the witness is 14:13:16

6 mistaken because she's decided, without any independent medical 14:13:19

<sup>7</sup> investigation, that these injuries had to have happened on that 14:13:23

8 Sunday afternoon. She totally disregarded that. She didn't 14:13:26

9 provide that information to Dr. Howard 14-13-28

Now if the lawyers are playing with a full deck -- and I 14-13-32

1 I think we already know they're not because they're not even 14 12 26

<sup>2</sup> Using available evidence to impeach Buckley and Dr. Howard and to assess

<sup>3</sup> It is important to note that our model does not allow for a conflict between the two objectives.

1 jury, I'm going to -- I'm really going to go after Detective 14:14:40  
2 Pesquiera on her evaluation of the blood evidence. 14:14:47

3 They charged Mr. Jones with a rape and assault on a Sunday 14:14:51  
4 and the next day Rachel dies. They know what he's wearing on 14:14:56  
5 Monday, the day she dies. They make no effort to identify 14:15:01  
6 either the child's clothing or Mr. Jones' clothing. 14:15:05

7 That's the sort of impeachment I would have done. I did it 14:15:12  
8 when she testified in these proceedings. And she had to 14:15:15  
9 concede that, for all we know, there could have been 14:15:18  
10 exculpatory evidence on the clothing Rachel wore, on the 14:15:22  
11 clothing Mr. Jones wore on the day of the assault. 14:15:26

12 So, for example, maybe there was no blood on the clothing 14:15:30  
13 that Mr. Jones wore on Sunday, which would absolutely inform us 14:15:32  
14 that the blood he had on his clothes on Monday came from 14:15:39  
15 attending to what turned out to be a dead child that they were 14:15:41  
16 getting to the hospital. 14:15:46

17 She could identify no case -- and she was in sexual assault 14:15:48  
18 cases forever -- where there had been neglect to identify the 14:15:53  
19 victim's clothing worn at the time of the alleged assault 14:15:56  
20 except this case. Because in this case she knew Mr. Jones was 14:16:00  
21 guilty based on essentially nothing, and didn't need to 14:16:04  
22 investigate anything. 14:16:06

23 Then if the trial lawyers were doing their job they would 14:16:10  
24 have presented her with evidence, information, that Rachel's 14:16:24  
25 mother was a serial abuser of her children; that she has had a 14:16:29

1 record of throwing them down stairs, hitting them in the 14:16:35  
2 stomach -- of course, Rachel had a stomach injury -- and she 14:16:38  
3 would have been queried as to: Why didn't you -- shouldn't you 14:16:45  
4 have investigated Rachel's mother as the perpetrator of these 14:16:48  
5 assaults? And she agreed when she testified at this hearing: 14:16:53  
6 You know, if I had known all this, I would have investigated. 14:16:57  
7 Well, Mr. Jones' trial lawyer should have made sure she knew 14:17:00  
8 about it. 14:17:05

9 THE COURT: But we're talking about several types of 14:17:06  
10 injuries now, so can you be a little more specific? Because 14:17:09  
11 we've got the laceration on the scalp, we've got the injury to 14:17:12  
12 the small intestine, and then we have the sexual assault. 14:17:15

13 MR. SANDMAN: So I was not referring to the sexual 14:17:19  
14 assault injury. 14:17:21

15 THE COURT: Okay. Thank you. 14:17:21

16 MR. SANDMAN: But as we made Detective Pesqueira aware 14:17:23  
17 of at the hearing, and the trial lawyers I think if they were 14:17:30  
18 doing their job, should have done this: 14:17:33

19 The defense lawyers obtained information that Rachel's 14:17:35  
20 older brother, teenage brother, Johnny, had to be removed from 14:17:41  
21 Rachel's bedroom because of suspicions of improper sexual 14:17:45  
22 touching. Now, not of Rachel. 14:17:49

23 We don't know that. We only know that Barry built a little 14:17:52  
24 add-on for Johnny and removed him from that room because there 14:17:57  
25 was evidence that he had been touching Brandie, Barry's 14:18:01

1 daughter. 14:18:06

2 But then we also know, from trial lawyers' notes, that 14:18:07

3 there were sexual issues between Johnny and Rachel that were 14:18:12

4 not -- apparently not ever investigated. 14:18:16

5 But Detective Pesqueira admitted when she testified here 14:18:19

6 that she would have investigated these issues regarding Johnny 14:18:24

7 and Rachel if she had known about it. Well, she should have 14:18:29

8 known about them, and defense counsel should have made her 14:18:32

9 aware of this information. 14:18:35

10 THE COURT: What about Zolie? 14:18:38

11 MR. SANDMAN: You know, Zolie was still having contact 14:18:43

12 with these children. He was at Rachel's birthday party. 14:18:45

13 Angela, in her interview, said that he was a frequent visitor 14:18:51

14 to the trailer where they were living. Presumably not -- when 14:18:55

15 Mr. Jones wasn't there. Certainly, he should have been 14:18:57

16 investigated, and, of course, we know that never happened. 14:19:00

17 So I think all those -- you know, when you look at the 14:19:03

18 state's case, everybody -- they could have impeached her. You 14:19:07

19 know, Becky and Dr. Howard and the police investigation. 14:19:13

20 And then of course we get to the -- I'll come back to the 14:19:16

21 Lopez twins, because you have a question on that. 14:19:19

22 The next question: Assuming Jones wasn't involved in 14:19:21

23 causing any of Rachel's injuries and others put him on notice 14:19:29

24 that she was ill on May 1st, why wasn't he on notice that she 14:19:32

25 needed to go to the hospital? 14:19:37

1 I want be careful on answering this question because.... 14:19:40  
2 Let me say it this way: I think there wasn't really direct 14:19:49  
3 testimony on that at the trial. There was a lot of witness 14:19:56  
4 statements, which the respondents have cited in their briefs, 14:20:01  
5 where they report that people told the police that they had 14:20:06  
6 told Jones that Rachel was ill and probably needed to get 14:20:11  
7 medical treatment. 14:20:14

8 But it wasn't presented at the trial because -- I don't 14:20:15  
9 know for sure "because." But they didn't need to present it 14:20:18  
10 because the theory was Jones was the killer, and he would have 14:20:21  
11 known she needed to go to the hospital for that -- 14:20:24

12 THE COURT: Let me reframe the question for you a 14:20:26  
13 little bit. 14:20:29

14 Did the state ever argue at trial that even if Jones did 14:20:30  
15 not commit these injuries, he still had a responsibility and 14:20:35  
16 should have been on notice to take her to the hospital? 14:20:41

17 MR. SANDMAN: No. No. 14:20:43

18 THE COURT: Was the theory of the state -- I just want 14:20:46  
19 to make sure I understand correctly. Was the theory of the 14:20:48  
20 state at trial that these charges were all intertwined? 14:20:51

21 MR. SANDMAN: The evidence was and the argument was he 14:21:00  
22 did it. He knew she obviously needed medical treatment but 14:21:02  
23 concealed it to cover up his own crime. It was as simple as 14:21:05  
24 that. 14:21:10

25 They didn't need to -- you know, they had him dead to 14:21:10

1 rights as being the rapist and the assaulter, you know, the 14:21:16  
2 person who assaulted her. And so that was the evidence. 14:21:21

3 There was never any kind of alternative, well, if he's 14:21:27  
4 still guilty, it would be for these reasons. It was all 14:21:30  
5 intertwined with his guilt for the actual assault. 14:21:33

6 I do want to say, Judge, on the topic of count four, you 14:21:39  
7 know, the state alleges, well, there was no way to defend that, 14:21:51  
8 other than arguing that Jones wasn't the legal custodian, and 14:21:53  
9 he lost that legal argument. But obviously we disagree with 14:21:57  
10 that. I mean, you had to defend count four the way you would 14:22:02  
11 have defended counts one, two, three, and five. I mean, the 14:22:06  
12 defense is he is innocent. 14:22:11

13 Now, is there still an argument under count four that he is 14:22:14  
14 criminally negligent? Or, as in the case of Angela, that he 14:22:20  
15 had a reckless mental state? Because obviously that night her 14:22:24  
16 head was bleeding, she was vomiting. 14:22:28

17 There is an issue there for the jury to decide. They 14:22:34  
18 weren't presented with that, with that alternative. In other 14:22:37  
19 words, it wasn't the case where there was, well, if he's not 14:22:41  
20 guilty of this, he's guilty of that. 14:22:46

21 But I think, in all candor, Dr. McKay and Dr. Ophoven 14:22:49  
22 thought there was medical neglect, but a negligence state of 14:22:55  
23 mind. 14:23:00

24 And the jury was actually instructed on lesser includeds. 14:23:00  
25 They were instructed that "criminal negligence" means with 14:23:06

1 respect to a result and -- excuse me. "Criminal negligence" 14:23:09  
2 means, with respect to a result or circumstance, that a person 14:23:16  
3 fails to perceive a substantial and unjustifiable risk that the 14:23:19  
4 result will occur or that the circumstance exists. The risk 14:23:24  
5 must be of such a nature and degree that the failure to 14:23:29  
6 perceive it constitutes a gross deviation from the standard of 14:23:33  
7 care that a reasonable person would observe. 14:23:37

8 So it's an objective test. The risk must be of such a 14:23:39  
9 degree that the failure to perceive it constitutes a gross 14:23:47  
10 deviation. 14:23:50

11 So that's like he's going to be judged the way a reasonable 14:23:51  
12 man would be judged. Whereas -- and if he was found guilty of 14:23:53  
13 that, it's a class four felony, and probation eligible, and 14:23:57  
14 short prison term, or whatever. 14:24:01

15 So it's not a death penalty case or a murder case. Because 14:24:02  
16 a murder case, felony murder requires they prove intent, and 14:24:07  
17 the jury was instructed that "intentionally" means a person's 14:24:11  
18 objective is to cause the result. 14:24:16

19 So, you know, if Jones is the perpetrator and he's 14:24:19  
20 withholding medical care, you know, it sounds to me like that's 14:24:23  
21 intent, because he is motivated to hide, disguise his own 14:24:28  
22 wrongdoing. 14:24:33

23 I guess, in short, what I am saying is that maybe there's a 14:24:34  
24 lesser included offense that the jury may have considered, but 14:24:40  
25 I don't think there is any reasonable likelihood that the jury 14:24:43

1      convicts him of felony murder, and the more serious intentional 14:24:47  
2      or knowing child abuse, if he is not the perpetrator. I mean, 14:24:51  
3      he's not the killer then. 14:24:59

4            I think they would probably say, if anything, you should 14:25:01  
5      have known better to get her care. And that's criminal 14:25:03  
6      negligence or, at worst, recklessness, which would render him 14:25:07  
7      not eligible for a felony murder charge. 14:25:13

8            The next question: Given that Jones does not dispute that 14:25:15  
9      he saw the Lopez twins at the Choice Market, why wasn't defense 14:25:20  
10     counsel's investigation into the Lopez twins' testimony 14:25:25  
11     minimally competent? 14:25:28

12           Now, in answering that question, I think you have to look 14:25:30  
13     at the broader picture of what these lawyers knew. Because, 14:25:36  
14     sure, they know that Mr. Jones was at the Choice Market on the 14:25:43  
15     late afternoon of Sunday. But they also know that, according 14:25:49  
16     to Becky, until Mr. Jones' trial, she insists that when 14:25:53  
17     Mr. Jones came back from the market, Rachel looks fine. 14:25:57

18           Now, that's important. Because, you know, part of what the 14:26:01  
19     Lopez twins are saying that they allegedly saw was a child 14:26:05  
20     crying, being beaten in the face, with red on her face. Well, 14:26:10  
21     he returns from the market and she doesn't look like she's been 14:26:15  
22     beaten in the face. 14:26:21

23           And then a little after 5:00 o'clock that day, when Rachel 14:26:22  
24     is found sick at Stephanie Fleming's house -- she's already 14:26:25  
25     feeling the effects of the peritonitis -- she is seen by 14:26:30

1 Stephanie Fleming, Dawn Kopp, and another individual who was 14:26:34  
2 with Ms. Kopp; they don't see any marks on her face that would 14:26:39  
3 indicate she had a beating about the face earlier that 14:26:44  
4 afternoon. 14:26:48

5 They also don't notice, by the way, her head bleeding. 14:26:48  
6 Which is very, very important. 14:26:52

7 Because, you know, this head injury, according to the 14:26:53  
8 state's theory, happens at the same time she receives her other 14:26:57  
9 injuries. But when she is seen, already sick from peritonitis, 14:27:00  
10 at 5:00 o'clock, her head is not seen bleeding. And when 14:27:04  
11 Detective Pesquiera interviewed Ms. Fleming, at the end of May, 14:27:09  
12 '94, she specifically asked her: Did you see her head 14:27:14  
13 bleeding? And she said: I looked and it wasn't. 14:27:18

14 Now, that's important. Because now it sounds to me like 14:27:21  
15 we're looking at an injury that Dr. Ophoven described, an older 14:27:25  
16 injury that starts to rebleed later that day due to shock from 14:27:30  
17 peritonitis, and actually would be consistent with Dr. Howard's 14:27:34  
18 view at least the first few times, couple times he spoke about 14:27:38  
19 it, that this injury was several days old and now it's 14:27:42  
20 reopening later that day, much later after she gets sick, when 14:27:46  
21 Mr. Jones brings her back from the Flemings' and he lays her 14:27:50  
22 down and he finds blood on the pillow. 14:27:55

23 THE COURT: Is the premise of my question though, 14:27:57  
24 question number two, correct? That Mr. Jones doesn't dispute 14:28:02  
25 seeing the Lopez twins? I want to make sure I ask -- 14:28:06

1 MR. SANDMAN: He does -- well -- 14:28:10

2 THE COURT: -- correct. 14:28:10

3 Did he make a statement of some sort -- 14:28:10

4 MR. SANDMAN: There is nothing -- there is a record in 14:28:14  
5 the -- that I think Mr. Jones provided to Mr. Gruen or somebody 14:28:18  
6 that he thought he saw them at another location in the parking 14:28:27  
7 lot. So there was -- it wasn't presented at the trial, but 14:28:30  
8 there is -- to answer your question directly, there is that in 14:28:36  
9 the record, where he said he saw them in a different location 14:28:39  
10 in that same parking lot. 14:28:42

11 But part of the direction I was going is that the 14:28:45  
12 lawyers know all these things that already suggest this child 14:28:48  
13 has come back from the market, she is already sick from 14:28:52  
14 peritonitis, her head is not -- her face doesn't indicate that 14:28:55  
15 it's been beaten on. 14:28:59

16 And then on top of that, nobody ever goes to the 14:29:01  
17 Choice Market to follow up on was Mr. Jones there at the same 14:29:09  
18 time as these children. He says he was, and that Rachel went 14:29:12  
19 in the store. 14:29:15

20 I asked Detective Pesqueira about that. This is more 14:29:17  
21 impeachment. I said that's someplace the police had to go on 14:29:21  
22 May 2nd to check on Mr. Jones' story. And she said: We sure 14:29:26  
23 did. And I said maybe Detective Ruelas went there and he 14:29:30  
24 actually found exculpatory information that Jones was there 14:29:36  
25 doing -- not to beat her at the market, but he went in shopping 14:29:39

1 with Rachel and she was fine. And she pretty much had to 14:29:44  
2 concede: Well, we don't know now about that either. 14:29:47

3 But the bigger point is, is having all these flags 14:29:50  
4 that the Lopez story doesn't add up. That she doesn't look 14:29:54  
5 like she's beaten in the face when she gets home. 14:29:58

6 The lawyers testified in these proceedings that they never 14:30:00  
7 believed that the Lopez children could see what they reported, 14:30:03  
8 given the size of the children and the size of the van and the 14:30:06  
9 six-foot-wide length between the doors, passenger and driver's 14:30:09  
10 doors. So that's their operating theory, is that the children 14:30:16  
11 couldn't see it. 14:30:22

12 And so my answer to your question is, if that's your theory 14:30:23  
13 as a defense lawyer, you should investigate that. 14:30:27

14 And they did. 14:30:30

15 A few days before the start of the trial, they got George 14:30:35  
16 Barnett, their investigator, to measure the van. But that was 14:30:40  
17 a partial, incomplete, useless investigation because it didn't 14:30:43  
18 take into account the size of the children, Mr. Jones' reach, 14:30:46  
19 the line of sight of the children. I mean, they had nothing. 14:30:51  
20 So they didn't even make use of those measurements. 14:30:55

21 So, you know, they did -- in *Strickland* parlance, they 14:30:59  
22 didn't have a reason to stop investigating that. Obviously, 14:31:05  
23 they should have started investigating that months earlier. 14:31:09

24 And they knew about -- those missing components of the size 14:31:14  
25 of the children were important. Because when Ms. Bowman 14:31:17

1 interviewed Ray, she said: How tall are you? And he said: I 14:31:22  
2 don't know. And she said: We'll look into that. 14:31:28

3 But they never did look into it. 14:31:31

4 And similarly, Sean Bruner testified in these proceedings 14:31:33  
5 he thought the children's statements were unreliable, perhaps 14:31:39  
6 influenced by their mother, and no investigation to confirm 14:31:42  
7 their own hypothesis. 14:31:46

8 Even though we had testimony from Dan Cooper and from 14:31:49  
9 Dr. Esplin that at the time of this trial reasonable lawyers 14:31:55  
10 knew that methods for investigating and interviewing children 14:31:59  
11 were critical. Dr. Esplin was testifying in cases back then, 14:32:03  
12 giving seminars. Mr. Cooper actually hired -- had hired 14:32:08  
13 Dr. Esplin in that time frame. 14:32:12

14 And so I am judging what they didn't do based on their 14:32:14  
15 failure to follow through on their own operating theories for 14:32:19  
16 the defense. I mean, what good is an operating theory if 14:32:22  
17 you -- I don't think the kids could see but then I don't 14:32:27  
18 investigate that? 14:32:30

19 Just to make one final point. 14:32:33

20 THE COURT: Yes. 14:32:34

21 MR. SANDMAN: That is, Mr. Bruner, when he had Ray 14:32:36  
22 Lopez in front of the jury, he said: Well, Ray, how -- he 14:32:41  
23 again asked: How tall are you? Do you think you could have 14:32:44  
24 seen in that van? And Ray said: Yep, I sure could. 14:32:47

25 That wasn't very effective because he wasn't prepared. 14:32:51

1 I don't know if you had a question, Judge. 14:32:55

2 THE COURT: No. Just, with the remaining time, you've 14:32:56  
3 got a little over 17 minutes left, and I was hoping to have you 14:32:59  
4 focus on the Dr. Keen question. 14:33:04

5 MR. SANDMAN: Well, that is important, and I will do 14:33:08  
6 that. 14:33:10

7 Respondents cite a lot of AEDPA cases. You know, 14:33:10  
8 under the AEDPA, the limited -- which require this Court and 14:33:20  
9 other federal courts to engage in a very limited review of 14:33:26  
10 cases that have been decided in the state courts. 14:33:31

11 AEDPA doesn't apply in this case. This is a de novo 14:33:35  
12 hearing. There was no prior state court decision. So when 14:33:39  
13 they cite *Richter* and *Pinholster* and these other cases, you 14:33:42  
14 should ignore those, they have no application to a de novo 14:33:46  
15 review by a federal judge. 14:33:50

16 That brings us back to the *Strickland* test, to answer your 14:33:51  
17 question. 14:33:55

18 Before you presume anything about strategy, the *Strickland* 14:33:59  
19 question is, or the question the Court must ask is, whether 14:34:02  
20 defense counsel conducted a reasonable investigation or made 14:34:09  
21 reasonable decisions that make investigations unnecessary. 14:34:12

22 If they have done that -- because that's what *Strickland* 14:34:18  
23 requires, reasonable investigation, or a reasonable decision 14:34:23  
24 not to investigate -- they can have whatever strategy they 14:34:25  
25 want. 14:34:29

1 If they haven't done that, if they haven't conducted a 14:34:29  
2 reasonable investigation, or made a reasonable decision not to 14:34:32  
3 investigate, that's ineffective assistance. 14:34:36

4 And in this case they couldn't conceivably have a strategy 14:34:40

5 to cut off Dr. Keen, or any other doctor, until they got an 14:34:44

6 answer to a fundamental question from somebody, and that was: 14:34:49

7 When did these injuries happen? 14:34:54

8 We know that they asked Dr. Keen that question. We also 14:34:55  
9 know that he never answered it. For several reasons. 14:34:58

10 Number one, we know the question was not answered because 14:35:02  
11 if he had answered it he would have testified at Mr. Jones' 14:35:04  
12 jury trial that these injuries -- I mean all of them -- didn't 14:35:08  
13 happen the day prior. 14:35:12

14 Dr. Keen testified at the hearing that the small bowel 14:35:15  
15 injury didn't happen the day before; and the vaginal injury, he 14:35:21  
16 agreed with Dr. Ophoven, was an older injury. 14:35:24

17 So if they asked him -- and they did ask the right 14:35:27  
18 question; but if he answered it, we wouldn't be here today. 14:35:30

19 THE COURT: Wasn't there some phone call between 14:35:33  
20 counsel and Dr. Keen? 14:35:36

21 MR. SANDMAN: There was a phone call. But Dr. Keen 14:35:38  
22 testified that he couldn't have opined on the timing of the 14:35:42  
23 injuries without reviewing the slides, the tissue slides from 14:35:49  
24 the autopsy and the photographs. And we know again, for two 14:35:53  
25 reasons, that that never happened. 14:35:58

1 Number one, the medical examiner's file does not 14:35:59  
2 contain a transmission to him of that information. And it has 14:36:02  
3 transmission, confirming transmission, to everyone else who's 14:36:06  
4 looked at them. And as Dr. Keen testified, at Maricopa County, 14:36:10  
5 where he worked, they documented everywhere those tissue slides 14:36:14  
6 went, and they did not go to Dr. Keen in this case. 14:36:19

7 Secondly, we know if he had reviewed the tissue 14:36:21  
8 slides, again, we wouldn't be here. We wouldn't have an 14:36:25  
9 ineffective assistance claim. Because when Dr. Keen looks at 14:36:28  
10 the data, he's told us the prosecutor theory was wrong. 14:36:33

11 THE COURT: So you're at 14 minutes. 14:36:37

12 MR. SANDMAN: I do want to say something else about 14:36:39  
13 why they had to investigate this medical injury. They had to 14:36:44  
14 get someone to answer that question. 14:36:48

15 The respondents have said, well, Dr. Keen didn't ask for 14:36:50  
16 the slides. Maybe he didn't ask for them. But the lawyers 14:36:54  
17 knew the slides had to be reviewed. Because Mr. Bruner said 14:36:58  
18 that at a July 1994 hearing, that he needed someone to review 14:37:02  
19 the slides. They had an article in their file, science article 14:37:06  
20 in the file, saying the slides had to be reviewed. Dr. Howard, 14:37:09  
21 in his interview, pretrial interview, was basing all of his 14:37:13  
22 timing opinions on review of the slides. 14:37:17

23 They knew that the slides had to be reviewed, and they 14:37:19  
24 needed to ask him or someone to look at them. It wasn't up to 14:37:22  
25 them to sit back and wait for someone to ask a question about 14:37:26

1 needing to look at them.

14:37:30

2 For all we know, in that phone call they may have only 14:37:32  
3 talked about the need for an additional autopsy. Because at 14:37:36  
4 that same July 1994 hearing, it's Exhibit 24D, Judge, there was 14:37:40  
5 a big to-do about the fact that going on three months from the 14:37:44  
6 child's death, Mr. Bruner had a hold on the body. And the 14:37:49  
7 judge was very upset and he said: I want you to get somebody 14:37:54  
8 and you tell us whether that autopsy needs to be redone. 14:37:57

9 So they had that August conversation with Dr. Keen, and 14:38:01  
10 then you'll see -- we have exhibits that show that right after 14:38:06  
11 that, Bruner released the body and then they didn't do anything 14:38:09  
12 else. 14:38:14

13 And not doing anything else was the story here. 14:38:15

14 Not impeaching Becky. Not impeaching Dr. Howard. Not 14:38:18  
15 following up on their own theories of why the Lopez children 14:38:21  
16 statements were unreliable. Not following up with Dr. Keen. 14:38:25  
17 Basically, you know, getting rid of their fact investigator 14:38:28  
18 after just a few days, other than calling him back to measure 14:38:33  
19 the van. I mean, doing nothing is the operative theme in this 14:38:36  
20 case. They did nothing, and you can see what the result was. 14:38:40

21 I'll reserve the rest of my time. 14:38:47

22 THE COURT: Thank you. 14:38:49

23 All right. Mr. Braccio. 14:38:50

24 MR. BRACCIO: May it please the Court, opposing 14:38:54  
25 counsel, Mr. Sandman, Ms. Smith, Myles Braccio on behalf of the 14:39:16

1 Arizona Attorney General's Office for respondents. 14:39:20

2 I'd like to thank the Court for coming down. I know the 14:39:22  
3 Court is very busy, and this is a lot of time and energy to 14:39:25  
4 come all the way down here. We sincerely appreciate it. 14:39:28

5 I'd like to begin by letting the Court know I've prepared a 14:39:30  
6 PowerPoint presentation, and the first couple of slides, I 14:39:34  
7 think, are going to get right to this Court's questions. Or 14:39:37  
8 question one for petitioner and respondent, as well as question 14:39:39  
9 one for respondent. I'll answer those questions directly. 14:39:43

10 The answer is the prosecutor absolutely did not intertwine 14:39:46  
11 these, and I am going to show the Court. 14:39:49

12 THE COURT: While you're doing that, do you want a 14:39:51  
13 warning when you have a certain amount of time left? 14:39:54

14 MR. BRACCIO: That would be great, Your Honor. Maybe 14:39:56  
15 at five minutes. 14:39:58

16 THE COURT: You've got it. 14:39:59

17 MR. BRACCIO: Okay. In this case there were three 14:40:00  
18 predicates for the felony murder. The first being the sex 14:40:03  
19 assault of a minor under the age of 15, which was count one; 14:40:06  
20 the second being the child abuse count for causing the ruptured 14:40:09  
21 duodenum and internal injuries; and the third being the child 14:40:14  
22 abuse for Jones' failure to seek medical aid for Rachel prior 14:40:17  
23 to her death. 14:40:20

24 Now, Jones must prove, under *Gallegos*, a Ninth Circuit 14:40:21  
25 law, that his trial counsel were constitutionally ineffective 14:40:26

1 for failing to investigate and present evidence undermining 14:40:27  
2 each of these predicate felonies. 14:40:29

3 As we've argued, Jones has presented no evidence in 14:40:32  
4 these proceedings whatsoever that his counsel were ineffective 14:40:34  
5 for failing to investigate and challenge his child abuse 14:40:38  
6 conviction for failing to seek medical care for Rachel. 14:40:40

7 This count is unrelated to the timing and nature of the 14:40:44  
8 injuries, as well as the identity of the assailant. 14:40:47

9 Now, let me talk briefly just about what Bruner and Bowman 14:40:51  
10 actually did to challenge this count. Because I think the 14:40:57  
11 supposition here is, well, they did nothing to challenge this 14:40:59  
12 count, and that's absolutely not true. 14:41:02

13 So they challenged the legality of this felony charge in a 14:41:04  
14 motion in limine, arguing that Jones did not have legal care 14:41:08  
15 and custody of Rachel. That's in the record on appeal at 63. 14:41:10

16 He told the jury in opening statements: You will hear that 14:41:15  
17 there is nothing obvious about the baby that day, about Rachel 14:41:17  
18 that day, something that would have caused Barry to just think 14:41:20  
19 he had to take her to the hospital. 14:41:23

20 They attempted to establish at trial that Jones did not 14:41:25  
21 make medical decisions for Rachel. 14:41:27

22 After the state's presentation, they moved, under Rule 20, 14:41:30  
23 to dismiss that count on the basis that he had no legal duty or 14:41:33  
24 care. 14:41:36

25 He argued to the jury in closing arguments that Jones did 14:41:37

1 not have a legal duty to Rachel.

14:41:40

2 The jurors were specifically instructed in this case to

14:41:42

3 consider each offense separately, quote, "uninfluenced by your

14:41:46

4 decision as to the other charges."

14:41:52

5 They were also instructed to consider all lesser-included

14:41:54

6 offenses, as well as all mental states.

14:41:58

7 THE COURT: At the trial, did the state ever argue the

14:42:00

8 same question I posed to petitioners?

14:42:04

9 MR. BRACCIO: No.

14:42:07

10 THE COURT: Did the state ever argue -- well, you

14:42:07

11 don't know what my question is.

14:42:09

12 MR. BRACCIO: I'm sorry, Your Honor. I thought you

14:42:11

13 were going to --

14:42:12

14 THE COURT: You know.

14:42:12

15 MR. BRACCIO: Go ahead. I apologize.

14:42:14

16 THE COURT: Did the state ever pose or frame the issue

14:42:16

17 to the jury that, even if he did not commit the offenses in the

14:42:21

18 other charges, standing alone, they could find him guilty of

14:42:26

19 count four? Or was the state's theory at trial that the

14:42:32

20 conduct contained in all these counts were essentially

14:42:37

21 inextricably intertwined?

14:42:41

22 MR. BRACCIO: The first.

14:42:45

23 The state argued sequentially that Jones was guilty of all

14:42:46

24 of the charges, but there was nothing, there was no theory by

14:42:48

25 the prosecutor, that they were somehow so essentially

14:42:52

1 intertwined that they are interrelated and relied upon each 14:42:55  
2 other. That's absolutely not true. The prosecutor argued each 14:42:59  
3 individual count consistent with the jury instructions. 14:43:03

4 THE COURT: Did the prosecutor ever argue -- my 14:43:05  
5 question, I think, may be just a little bit different. 14:43:08

6 MR. BRACCIO: Okay. 14:43:08

7 THE COURT: Did the prosecutor ever argue that even if 14:43:11  
8 they don't find him guilty of counts one through three and 14:43:13  
9 five, they could find him guilty of count four because? 14:43:17

10 MR. BRACCIO: Not that explicitly, but I think it's 14:43:21  
11 there. So let me show -- 14:43:24

12 THE COURT: Show me where it is. 14:43:26

13 MR. BRACCIO: Let me show you what the prosecutor -- 14:43:27  
14 so this is the record on appeal, this is transcript April 13th, 14:43:29  
15 1995. This is the closing argument of the prosecutor. 14:43:32

16 So, as she is discussing these counts, this is the 14:43:40  
17 part in her closing argument where she addresses the failure to 14:43:43  
18 render aid. This is at Page 88. She says: 14:43:47

19 Count four. That night -- well, actually start 14:43:51  
20 earlier. During that afternoon on Sunday, Rachel was bleeding 14:43:53  
21 from her head. Who's the only adult with her? The defendant. 14:43:57  
22 Does he take her anywhere to get that wound treated? No, he 14:44:01  
23 doesn't. He was the only person who was -- who had -- who had 14:44:04  
24 care of Rachel during those hours; and he didn't take care of 14:44:13  
25 her, didn't get her the medical attention she needed, and he 14:44:16

1 compounded that omission by sitting silently by during the 14:44:20  
2 night as Rachel suffered. 14:44:24

3 The defense counsel told you in opening you are going 14:44:26  
4 to hear, ladies and gentlemen, there wasn't anything obvious 14:44:30  
5 about Rachel that night that would have given anybody a clue 14:44:33  
6 that anything was wrong with her. 14:44:36

7 Rebecca saw the bruises to her face and the bruises to her 14:44:37  
8 fingers and her hands. Rebecca saw that baby throwing up. 14:44:41  
9 Where was she throwing up? Do you remember Bruce Clark found a 14:44:44  
10 pot? Becky told you she had been throwing up in that pot. 14:44:48  
11 Well, the pot was found in the bedroom, the defendant's 14:44:53  
12 bedroom, the bedroom he shared with Angela. 14:44:55

13 What are the symptoms of peritonitis? What are the 14:44:58  
14 symptoms that something was seriously wrong with this baby? 14:45:03  
15 Setting aside the fact that she hadn't stopped bleeding hours 14:45:05  
16 after her injury was incurred, she is throwing up. Dr. Howard 14:45:08  
17 and Dr. Seifert said she would have become dehydrated and want 14:45:12  
18 to drink, but would continue to throw up, run a fever. She 14:45:17  
19 would be in pain. She wouldn't even want to be able to lift 14:45:20  
20 herself up or move around, the pain would be so great. 14:45:32

21 That's just from the internal injuries. 14:45:36

22 Imagine how she was feeling having an untreated laceration 14:45:39  
23 bleeding from her head? Imagine how she was feeling bleeding 14:45:42  
24 from the inside of ears? Imagine how she was feeling with 14:45:45  
25 blood seeping in under her scalp as a result of blows she 14:45:48

1 received to the side and front of her face. Imagine how she 14:45:51  
2 felt bleeding from the back of her neck, from the direct blow 14:45:53  
3 to the back of her neck? Imagine how she felt with her little 14:45:56  
4 vagina bleeding into her little underpants? 14:46:01

5 She was only four years old. 14:46:04

6 She even told Brandie her stomach hurt, depending on how 14:46:06  
7 much to believe, how much Brandie had to say. 14:46:09

8 Nothing obvious about Rachel? Nothing that would give a 14:46:11  
9 clue to the two adults who were supposed to be in charge of 14:46:16  
10 her, who had care of her, that she needed medical attention? 14:46:19

11 Oh, there was lots obvious. 14:46:22

12 Angela Gray will have to deal with her responsibility for 14:46:23  
13 her ignoring those obvious signs in another courtroom, in 14:46:26  
14 another forum. The defendant has to deal with his now. 14:46:30

15 He was the only person in that household who had a car. He 14:46:33  
16 was the only person in that household who had a means of 14:46:37  
17 transportation. He had the money. He bought the groceries. 14:46:40  
18 He built the children's bed. He had care of her all that day. 14:46:44

19 If you find that he shared responsibility for making sure 14:46:47  
20 that Rachel got the medical treatment that she needed, then he 14:46:52  
21 is guilty of intentionally and knowingly failing to provide 14:46:55  
22 that care. And if you find that she died also as a result of 14:46:57  
23 that, it was under circumstances likely to produce death or 14:47:01  
24 serious physical injury. 14:47:04

25 And we know from Dr. Seifert's testimony surgical 14:47:06

1 intervention could have saved her, but he and the woman with 14:47:09  
2 whom he was living at the time chose not to provide her with 14:47:12  
3 that simple surgical intervention. Instead, they wait until 14:47:15  
4 she had been dead two or three hours before they decided to try 14:47:18  
5 CPR and take her to the hospital. 14:47:22

6 Rachel Gray did not have to die. Rachel Gray could have 14:47:24  
7 celebrated her fifth birthday, but, because of all of this, she 14:47:28  
8 will not. Because of Barry Lee Jones, she will not. And that, 14:47:32  
9 of course, is the issue. 14:47:35

10 THE COURT: So maybe on that same section of the 14:47:37  
11 transcript, if you could turn back to Page 86 with me, please. 14:47:41

12 MR. BRACCIO: Sure. To which page? 14:47:44

13 THE COURT: Eighty-six. 14:47:47

14 MR. BRACCIO: It starts at 88. 14:47:48

15 THE COURT: No, I know, but I'm looking at 86. Do you 14:47:51  
16 have 86? 14:47:54

17 MR. BRACCIO: I don't. 14:47:54

18 THE COURT: Okay. I do. 14:47:55

19 It says: Even more importantly -- this is the prosecutor's 14:47:55  
20 argument -- what's the defense in this case? Not that Rachel 14:47:57  
21 was not a victim of these crimes, but that "we got the wrong 14:48:01  
22 guy." 14:48:05

23 So wasn't it ineffective of trial counsel, defense counsel, 14:48:05  
24 not to look at the cause of the injuries? Because my 14:48:14  
25 recollection of the evidentiary hearing were there were other 14:48:18

1 evidence proffered of how these injuries could have occurred. 14:48:23  
2 Other than the state's theory, which is Mr. Jones did it. 14:48:30  
3 Right? 14:48:36

4 MR. BRACCIO: Sure. 14:48:36

5 THE COURT: So what follow-up was done? What 14:48:37  
6 follow-up was done by the state? 14:48:41

7 Because this statement says that the state's theory is 14:48:43  
8 the state -- the prosecutor is summarizing what they believed 14:48:48  
9 to be the defense at trial, which is you got the wrong guy. 14:48:52

10 MR. BRACCIO: Mmm-hmm. 14:48:56

11 THE COURT: Not that these injuries could have been 14:48:56  
12 not crimes. 14:48:58

13 MR. BRACCIO: I'm not sure I follow. 14:49:03

14 THE COURT: So I am saying what -- wasn't it 14:49:04  
15 ineffective assistance not to follow up on some of these other 14:49:09  
16 causes of these injuries? 14:49:14

17 MR. BRACCIO: No, I believe the counsel followed up on 14:49:16  
18 all of these injuries. 14:49:18

19 THE COURT: Okay. 14:49:20

20 MR. BRACCIO: And I can take you through all of that. 14:49:20

21 So this is on the failure to seek aid. I think to 14:49:22  
22 answer Your Honor's first question for petitioner and 14:49:26  
23 respondent: Did the prosecutor argue to the jury that these 14:49:29  
24 were so intertwined? I think, very clearly, the answer to that 14:49:33  
25 is in this transcript, the prosecutor did not argue that. The 14:49:34

1 prosecutor stated very close to exactly what the jury 14:49:36  
2 instructions were, which is to consider each count separately 14:49:39  
3 and base the evidence in your conviction off of that. 14:49:43

4 And of course they've conceded essentially in this 14:49:51  
5 hearing that their own experts agree that it was fatal neglect 14:49:53  
6 for Jones not to take Rachel to the hospital. 14:49:57

7 I can show his own experts agreed. 14:50:03

8 This is Dr. Ophoven's 2002 report: In the hours before 14:50:09  
9 Rachel and Barry went to bed, it would have been evident to 14:50:12  
10 anyone with Rachel that she was in need of immediate medical 14:50:14  
11 attention. It is my opinion that the decision to withhold 14:50:17  
12 medical care is consistent with fatal neglect. 14:50:21

13 And I would mention again, too, there's been a lot of 14:50:23  
14 argument here about what Barry Jones knew, and whether he knew 14:50:28  
15 to take her to the hospital and how serious his (sic) injuries 14:50:34  
16 were. 14:50:36

17 THE COURT: Right. 14:50:36

18 MR. BRACCIO: The jury already found that. The jury 14:50:37  
19 found that he intentionally failed to take her. 14:50:39

20 The Arizona Supreme Court affirmed that decision, 14:50:41  
21 finding it was both sufficient evidence and a predicate felony 14:50:44  
22 for felony murder, and of course those are entitled to 14:50:47  
23 deference by this Court. So Jones can't simply reargue the 14:50:50  
24 trial evidence in his favor for this count. 14:50:54

25 Of course, Your Honor, I cited that the lawyer's 14:50:57

1 arguments or theories are not evidence. 14:51:04

2 The jury was properly instructed to consider each offense 14:51:06  
3 separately. 14:51:10

4 The jury's special verdicts found each offense separately. 14:51:16

5 This is for the child abuse count, count four. By failing 14:51:21  
6 to take the victim to the hospital, as alleged in count four, 14:51:24  
7 the jury also specifically found that it was an objective 14:51:29  
8 circumstance likely to produce death or serious physical 14:51:31  
9 injury, and that he committed it intentionally or knowingly. 14:51:34

10 The prosecutor did not intertwine these crimes. 14:51:42

11 And Jones is also wrong on Arizona law. 14:51:46

12 He also made an argument about comparing it to the Angela 14:51:51  
13 Gray trial and verdict. And, of course, this Court cannot 14:51:55  
14 compare, legally, jury verdicts. I cited this court a number 14:51:58  
15 of cases: -- Powell, Dunn, Hart -- for that proposition. 14:52:02

16 THE COURT: But you also pointed out, you know, what 14:52:06  
17 he's characterized as significant differences in the testimony 14:52:10  
18 that was given in both trials. So you're telling me that -- 14:52:14  
19 how does that factor? 14:52:17

20 MR. BRACCIO: Let me bring that up, Your Honor. 14:52:26

21 I believe that's a mischaracterization of this record. I 14:52:28  
22 think Dr. Howard has consistently stated his opinion time and 14:52:30  
23 time again. And let me show you, let me turn to that. 14:52:34

24 THE COURT: Sure. 14:52:34

25 MR. BRACCIO: Trial counsel investigated every aspect 14:52:36

1 of this case that they have been accused of neglecting. 14:52:39

2 I mentioned a couple other additional things, like their 14:52:42  
3 pretrial motion practice. This is directly relevant. If the 14:52:44  
4 Court looks to the *Strickland* decision, it will see that that's 14:52:47  
5 another factor. 14:52:50

6 They challenged every legal aspect of this case that they 14:52:51  
7 could. Fourth Amendment, searches of the van, the trailer. 14:52:54  
8 Fifth Amendment, his statements. Severance, *Bruton* and 14:52:56  
9 antagonistic defenses. 14:53:00

10 What I found startling was they were actually successful in 14:53:02  
11 precluding Jones' violence towards his own children, as well as 14:53:06  
12 Rachel's statements that he was the person who had inflicted 14:53:10  
13 the injuries on her with the metal shoe bar. 14:53:14

14 The trial court even noted on the eve of trial: "One of 14:53:17  
15 Bruner's strategies is to paper us to death." 14:53:18

16 I think the record clearly indicates that there was funding 14:53:21  
17 challenges that Bruner and Bowman faced. The Court wouldn't 14:53:24  
18 even officially appoint second counsel, as well as funding for 14:53:30  
19 experts. 14:53:33

20 So let's talk about the medical investigation. 14:53:34

21 Both Bruner and Bowman had previously represented capital 14:53:36  
22 defendants, and Bruner specifically had handled cases involving 14:53:40  
23 medically-complex injuries. 14:53:44

24 THE COURT: Wasn't he qualified as an expert? 14:53:46

25 MR. BRACCIO: Yes. 14:53:48

1 THE COURT: Not an expert. But he had a -- 14:53:48

2 MR. BRACCIO: A specialist. 14:53:48

3 THE COURT: A specialist. 14:53:48

4 MR. BRACCIO: He was a criminal law specialist. 14:53:49

5 In preparation for the case, they read all the police 14:53:51

6 reports, the autopsy report, the medical hospital records, and 14:53:55

7 specifically an article about duodenal injuries. 14:53:58

8 The medical investigation, they immediately requested 14:54:02

9 funding for an independent medical examiner to review the 14:54:06

0 autopsy report and Dr. Howard's medical conclusions. 14:54:09

1 Bruner and Bowman contacted Dr. Phillip Keen. He agreed to 14:54:12

2 consult with them. 14:54:17

3 After speaking with Dr. Keen, Bruner and Bowman drafted the 14:54:18

4 letter to him identifying the areas they wanted him to focus 14:54:23

5 on. This letter in the record is the only evidence that speaks 14:54:25

6 to this, about where they were focused in terms of their 14:54:32

7 medical investigation. 14:54:35

8 Could you please tell me what kind of symptoms this child 14:54:37

9 would have experienced from a small bowel laceration? How long 14:54:40

0 after the injury occurred could this child die -- would this 14:54:44

1 child die? Can the injury be dated? Can the time of death be 14:54:48

2 determined? Could such an injury have been inflicted by 14:54:52

3 another small child? 14:54:55

4 These are all attempts to corroborate what they were 14:54:57

5 hearing from Barry Jones, and specifically the timing of these 14:54:59

1      injuries. And that's a natural question, given these medical      14:55:03  
2      injuries, because they're looking to find out who did this to      14:55:06  
3      her and when did they do it.      14:55:08

4 So can the injury be dated? If this injury occurs three 14:55:10  
5 days earlier, I need to focus my investigation on three days. 14:55:13

6 In your opinion, are the multiple contusions and 14:55:15  
7 lacerations consistent with child abuse, or could they be 14:55:21  
8 within the normal range of injuries sustained by a rough or 14:55:25  
9 clumsy child? 14:55:28

10 Again, she is looking for all the ways in which the medical 14:55:29  
11 evidence can help corroborate aspects of their defense. 14:55:31

12 And number seven: Can the injury to the genitalia be 14:55:34  
13 dated? Is there explanation aside from sexual abuse? And is 14:55:37  
14 the hemorrhage behind the tympanic membranes consistent with a 14:55:41  
15 fall that resulted in a bumped head? 14:55:45

16 This letter proves beyond any doubt in this record that 14:55:47  
17 Bruner and Bowman were focused on the timing and nature of 14:55:50  
18 these injuries. 14:55:53

19 THE COURT: Yeah, but what about the follow-through? 14:55:54

20 MR. BRACCIO: Okay. So they spoke with Dr. Keen the 14:55:56  
21 following month, on August 18th, 1994. Bruner, Bowman, and 14:55:59  
22 Dr. Keen have no independent recollection of this conversation, 14:56:03  
23 so this Court must presume by law that they acted competently 14:56:05  
24 and they performed competently. 14:56:10

25 THE COURT: Then how do you address the slide issue? 14:56:12

1 MR. BRACCIO: What slide issue? That he didn't look 14:56:14  
2 at any of the slides? 14:56:18

3 THE COURT: Correct. 14:56:19

4 MR. BRACCIO: First of all, I don't know that we know 14:56:20  
5 what he looked at, so we don't have specific evidence that says 14:56:22  
6 the slides were sent to him and he reviewed them. 14:56:25

7 THE COURT: Well, I thought the -- correct me if I'm 14:56:29  
8 wrong, but I thought the evidence at the evidentiary hearing 14:56:31  
9 was that if the slides had been sent there would be a record of 14:56:34  
10 the slides being sent, if the slides had been received by 14:56:38  
11 Dr. Keen there would be a record that they were received, and 14:56:43  
12 that there is an absence of either. So how can I presume under 14:56:46  
13 those circumstances that he reviewed the slides? 14:56:52

14 MR. BRACCIO: Maybe he did, maybe he didn't. I think 14:56:58  
15 that was -- 14:57:00

16 THE COURT: Well, I know you would like to say 14:57:01  
17 maybe -- 14:57:05

18 MR. BRACCIO: Sure. 14:57:05

19 THE COURT: But if the testimony at the hearing was if 14:57:06  
20 we send slides there's a record -- 14:57:09

21 MR. BRACCIO: Sure. 14:57:11

22 THE COURT: -- and if the testimony from Dr. Keen is 14:57:11  
23 if we received slides there's a record, and there is no record 14:57:15  
24 on either end -- 14:57:18

25 MR. BRACCIO: Sure. 14:57:19

1                   THE COURT: -- how can I presume that he reviewed the 14:57:19  
2 slides? 14:57:23

3                   MR. BRACCIO: Okay. And you don't have to presume 14:57:24  
4 that he reviewed the slides. 14:57:26

5                   So in the letter from Bruner and Bowman to Dr. Keen -- 14:57:27

6                   THE COURT: The letter we were just looking at. 14:57:31

7                   MR. BRACCIO: Yes. -- she said what we will do is 14:57:33  
8 send you the autopsy report and speak with you about these 14:57:35  
9 injuries, and if you need any additional follow-up or request 14:57:39  
10 anything, we'd be happy to provide those to you. Like the 14:57:42  
11 tissue slides -- 14:57:45

12                  THE COURT: But didn't he testify at the hearing that 14:57:46  
13 he would not make a diagnosis absent looking at the slides? Or 14:57:48  
14 am I misremembering his testimony? Didn't he say that he would 14:57:52  
15 have to see the slides in order to form an opinion? 14:57:55

16                  MR. BRACCIO: I don't recall that testimony. But I 14:57:59  
17 would note for the Court still he hasn't reviewed the slides. 14:58:01  
18 He still hasn't reviewed the slides. 14:58:04

19                  THE COURT: So your argument is it's fair for me to 14:58:06  
20 assume that he never reviewed the slides. 14:58:10

21                  MR. BRACCIO: I think that's a fair assumption, that 14:58:12  
22 he probably never reviewed the slides. 14:58:14

23                  I think what Dr. Keen did was he knew the nature of 14:58:15  
24 this injury, the duodenal injury and the vaginal injuries, he 14:58:18  
25 had the autopsy report, so he understood what Dr. Howard was 14:58:22

1 saying, and he can talk to Bruner and Bowman about the timing 14:58:26  
2 of this type of injury. 14:58:29

3 All of the pathologists and all of the doctors in this case 14:58:31  
4 specifically say: We can't give you a precise determination of 14:58:33  
5 the time in which this injury is inflicted, but we generally 14:58:36  
6 know, in the pathology, that this injury can be from hours to 14:58:40  
7 days. 14:58:43

8 THE COURT: So I am misremembering his testimony at 14:58:43  
9 the evidentiary hearing where I thought I recall him saying he 14:58:46  
10 would need to have the slides and review the slides before he 14:58:48  
11 could render an opinion? 14:58:51

12 MR. BRACCIO: Your Honor, he still hasn't reviewed the 14:58:53  
13 slides in this case. I am not sure if he's rendered an opinion 14:58:55  
14 in this case. I have his testimony here, too, that we can go 14:58:59  
15 through, and you may have remembered that correctly. 14:59:02

16 I think Dr. Keen did tell Bruner and Bowman about the 14:59:04  
17 nature of this, and that he couldn't offer any specific 14:59:08  
18 rebuttal to what Dr. Howard was saying, that Dr. Howard's 14:59:11  
19 opinions were consistent with this injury being inflicted on 14:59:13  
20 the Sunday before. 14:59:17

21 THE COURT: Well, I understand what you're saying. 14:59:20

22 MR. BRACCIO: Again, this Court must presume by law 14:59:23  
23 that they performed competently. Obviously, you have to 14:59:26  
24 presume by law that they spoke with Dr. Keen about the case, 14:59:28  
25 the autopsy and the medical records, and the timing and nature 14:59:33

1 of the injuries.

14:59:35

2 THE COURT: So if they didn't send the slides, that  
3 would be competent?

14:59:36

14:59:38

4 MR. BRACCIO: Yes. They sought out an independent  
5 medical pathologist to provide them with medical evidence about  
6 the nature of these injuries, and their letter speaks  
7 specifically to that so that they could understand.

14:59:41

14:59:43

14:59:47

14:59:51

8 If they had met with Keen and Keen said, "oh, no, the  
9 nature of this injury is seven days to thirty days," they would  
10 have called Dr. Keen. So they clearly understood from Dr. Keen  
11 the nature of the injury.

14:59:53

14:59:57

15:00:01

15:00:10

12 THE COURT: If Keen told them at the time that he  
13 needed the slides in order to form an opinion and they didn't  
14 send him the slides, your argument is that is still competent?  
15 They were still -- they provided competent representation in  
16 that case? Is that your argument?

15:00:21

15:00:27

15:00:30

15:00:33

15:00:35

15:00:38

15:00:40

15:00:40

17 MR. BRACCIO: I think that's a closer call. If  
18 they --

15:00:35

15:00:38

15:00:44

15:00:44

15:00:46

19 THE COURT: Well, is it not a yes or a no?

15:00:35

15:00:38

15:00:44

15:00:46

1 in order to render an opinion, am I not obligated to provide 15:00:48  
2 them that information? 15:00:52

3 MR. BRACCIO: You are. 15:00:53

4 THE COURT: And if I didn't provide that information, 15:00:54  
5 what kind of job am I doing? 15:00:56

6 MR. BRACCIO: Sure. And so, in that regard, I would 15:00:58  
7 also refer the Court to Leslie Bowman's testimony at the 15:01:01  
8 evidentiary hearing, in which she said: If Dr. Keen would have 15:01:04  
9 requested more evidence, including the tissue slides, I would 15:01:07  
10 have sent it to him. Bruner also testified the same way. And 15:01:10  
11 I even asked Ms. Bowman on the stand: Have you ever in your 15:01:14  
12 career had evidence that would have been helpful for a client 15:01:17  
13 and you just refused to put it on or you dropped the ball? And 15:01:20  
14 she said: Never in my career. 15:01:24

15 So we have specific testimony from the lawyers in this 15:01:26  
16 case that said: If Dr. Keen would have requested that 15:01:28  
17 additional information, I would have provided it to him. 15:01:31

18 And as well, Dr. Keen, if he would have rebutted any 15:01:36  
19 claim of the medical claim in Jones' favor, Bruner and Bowman 15:01:41  
20 testified they would have called him as a witness. 15:01:45

21                   Thus, I think within three months -- and here's my 15:01:46  
22 understanding of the record and why this is well beyond the 15:01:49  
23 minimally competent standards of *Strickland*. 15:01:52

24 Within three months of Rachel's death and Jones' arrest, 15:01:55  
25 they had reviewed the autopsy report and medical records, 15:01:58

1 reviewed the police reports, spoke to Jones numerous times, 15:02:01  
2 obtained an investigator and sent him out to the Desert Vista 15:02:05  
3 Trailer Park, sought out an independent medical pathologist and 15:02:09  
4 consulted with him about the nature and timing of those 15:02:13  
5 injuries. 15:02:16

6 If Dr. Keen offered no rebuttal, Bruner testified in this 15:02:16  
7 case that he wouldn't keep shopping for an expert. And I think 15:02:21  
8 that's where we're drawing the line in this hearing. I think 15:02:24  
9 Jones' current counsel would suggest that in order to be 15:02:27  
10 constitutionally efficient under the law, they need to call 15:02:31  
11 experts, and that's simply not the law. 15:02:34

12 THE COURT: I understand your argument on this point. 15:02:38  
13 Why don't you turn your attention to the second question, the 15:02:40  
14 second question that I asked, which is the law enforcement 15:02:43  
15 investigation. 15:02:47

16 MR. BRACCIO: Okay. 15:02:47

17 The law enforcement investigation, we have contended 15:02:55  
18 all along, is simply not relevant in this case. There is no 15:02:58  
19 claim before the Court that law enforcement -- law enforcement 15:03:01  
20 was deficient. 15:03:04

21 As it's contained in an ineffective assistance of counsel 15:03:08  
22 claim, again, what did the lawyers do? Law enforcement has 15:03:13  
23 nothing to do with this case. What did the lawyers do or what 15:03:16  
24 did they fail to do, and what have they presented now to show 15:03:19  
25 that law enforcement was deficient, and what's the actual 15:03:22

1 prejudice? What did law enforcement miss that they can 15:03:25  
2 affirmatively show this Court now demonstrates reversible 15:03:28  
3 prejudice? 15:03:32

4 And there is nothing in this case -- 15:03:33

5 THE COURT: We don't know if they didn't follow up on 15:03:34  
6 important aspects of the investigation. For instance, 15:03:38  
7 Investigator Pesquiera, I thought her testimony was she 15:03:42  
8 acknowledged she never followed up with interviewing Zolie. 15:03:46

9 MR. BRACCIO: Sure. 15:03:49

10 THE COURT: Am I remembering correctly? 15:03:51

11 MR. BRACCIO: You are, Your Honor. Let me talk 15:03:53  
12 about -- 15:03:58

13 THE COURT: And if I recall correctly, wasn't that the 15:03:59  
14 reason Angela took the children out of the living situation 15:04:02  
15 with Zolie because she didn't feel safe there? And then she 15:04:06  
16 moved in with Mr. Jones? 15:04:13

17 MR. BRACCIO: Yeah, let me be very careful about what 15:04:15  
18 this record says. Angela -- 15:04:17

19 THE COURT: I just want to make sure I understand the 15:04:18  
20 record correctly. 15:04:19

21 MR. BRACCIO: Yeah. You know, let me start off by 15:04:20  
22 saying this is Jones' burden. He has access to Angela. He's 15:04:21  
23 been in contact with Angela. He could call Angela in this 15:04:26  
24 proceeding. He can investigate and find Zolie. He can 15:04:29  
25 investigate and find other suspects. 15:04:32

1               THE COURT: In fairness, you're saying that, 23 years 15:04:34  
2 after the fact, it was his burden to go find Zolie, when 15:04:38  
3 Investigator Pesquiera said at the time she never followed 15:04:43  
4 through and tried to find or interview Zolie? Is that your 15:04:47  
5 argument? 15:04:51

6               MR. BRACCIO: Yes. That he has to affirmatively find 15:04:52  
7 evidence to affirmatively show prejudice, and that Zolie was a 15:04:55  
8 potential other suspect. 15:04:58

9               Let me talk to the Court about what the evidence about 15:05:01  
10 Zolie was that directed the law enforcement investigation and 15:05:04  
11 what the lawyers knew about who Zolie was. Okay? 15:05:07

12               Angela told detectives that Zolie hit her when he was 15:05:10  
13 drunk, but she repeatedly stated that he never abused any of 15:05:14  
14 her children. And I have all of those interviews here. 15:05:18

15               This is Exhibit 1, at Page 512. 15:05:22

16               Question: Was he abusive towards the kids? 15:05:25

17               No. 15:05:28

18               Not at all? 15:05:29

19               No, not at all. 15:05:30

20               This is Zolie. 15:05:32

21               Let's go to the next interview. 15:05:36

22               He has never, ever hit the kids, or me. 15:05:38

23               No. Oh, no, no, no. Nobody has ever hurt my kids. 15:05:42

24               He used to slap me. 15:05:48

25               Okay. So he never -- 15:05:49





1                   THE COURT: Am I remembering correctly?                   15:08:24

2                   MR. BRACCIO: Yes, you are, Your Honor.                   15:08:26

3                   Let me walk you through that testimony.                   15:08:28

4                   THE COURT: Okay.   15:08:29

5                   MR. BRACCIO: Okay. And maybe if I can address both           15:08:31

6                   the testimony on the abdominal injury, as well as the vaginal           15:08:33

7                   injury.   15:08:36

8                   THE COURT: Yeah, please.                                        15:08:37

9                   MR. BRACCIO: This is very important.                      15:08:37

10                  So, with these internal injuries, Jones called Drs.           15:08:41

11                  Ophoven and McKay.    15:08:49

12                  Dr. Ophoven, with the abdominal injury, repeatedly changed    15:08:50

13                  her timeline. In her first report, she indicated that this    15:08:53

14                  abdominal injury was 24 to 48 hours, and perhaps longer, prior    15:08:55

15                  to her death.    15:08:58

16                  Her postmortem weight is consistent with these abnormal           15:09:01

17                  chemistries, and in my opinion represents an injury that had to    15:09:05

18                  be present greater than 24 to 48 hours, and perhaps longer.           15:09:09

19                  THE COURT: Maybe I'm misremembering, but didn't she           15:09:13

20                  testify at the last evidentiary hearing that -- wasn't it a    15:09:16

21                  different stain that was used to help refine her assessment?    15:09:18

22                  MR. BRACCIO: Yeah. Very good memory on this. For           15:09:22

23                  the vaginal injuries.    15:09:24

24                  Now, I want to be very clear about what I think the           15:09:25

25                  record says in this case, because I think this is sort of an    15:09:27

1 open question about what she reviewed. 15:09:31

2 My review, when you look at her -- let me go to the 15:09:33  
3 vaginal injuries. This is everything that Ophoven has to say 15:09:37  
4 about the vaginal injuries. 15:09:52

5 She dated the vaginal injuries shortly before death in her 15:09:54  
6 first two reports. This is her 2002 report, Exhibit 103. Now 15:09:57  
7 let me key in on this right here. 15:10:04

8 My review of the autopsy included 13 H&E stain tissue 15:10:07  
9 slides, 13 trichrome stain tissue slides, 13 iron stain tissue 15:10:13  
10 slides, autopsy report, toxicology and chemistry results. 15:10:18

11 My reading of Dr. Ophoven's report is that she reviewed 15:10:24  
12 these tissue slides with this staining: the H&E, the trichrome, 15:10:27  
13 and the iron. 15:10:32

14 Now, the atlas that they subsequently admitted in this 15:10:33  
15 hearing -- and Dr. Ophoven doesn't make it clear on the stand 15:10:36  
16 what new type of staining she reviewed. And I think from the 15:10:39  
17 atlas that I subsequently reviewed prior to argument today, it 15:10:43  
18 indicates a trichrome stain. 15:10:45

19 Those are the only stains possible to put onto a tissue 15:10:48  
20 sample to determine the age. 15:10:51

21 So I can't conclude from the record before the Court that 15:10:53  
22 she reviewed any new type of special staining that would have 15:10:57  
23 given her any special insight into that, or why she didn't 15:11:00  
24 review that prior to this 2002 report. 15:11:04

25 Again, from her 2002 report here, she says she reviewed 15:11:07

1 tissue slides. Section from vagina, labia minora, genital skin 15:11:11  
2 shows acute hemorrhage less than six hours prior to death. So 15:11:17  
3 Dr. Ophoven is putting the vaginal injury less than six hours 15:11:22  
4 prior to death. 15:11:25

5 In addition, in her report, she subsequently concludes, to 15:11:31  
6 a reasonable degree of medical certainty, the presence of 15:11:34  
7 genital trauma without evidence of ejaculate leaves only the 15:11:38  
8 conclusion that the child suffered acute injuries, most 15:11:41  
9 probably penetrating, shortly before her death. 15:11:44

10 She said the exact same thing in her subsequent report, in 15:11:47  
11 2009, that the child suffered acute injuries, most probably 15:11:55  
12 penetrating, shortly before her death. She concluded this, to 15:12:00  
13 a reasonable degree of medical certainty, after reviewing those 15:12:05  
14 tissue slides. 15:12:09

15 Then Ophoven changed her opinion about the vaginal injury 15:12:10  
16 in her February 2010 report. And I want to pull up that report 15:12:13  
17 for the Court. 15:12:18

18 She says now, in 2010: The presence of genital trauma 15:12:20  
19 without evidence of ejaculate leaves only the conclusion that 15:12:24  
20 the child suffered acute injuries, most probably penetrating, 15:12:28  
21 sometime -- and now she brackets the change in her report -- 15:12:31  
22 days, or perhaps longer, before her death. 15:12:37

23 Now Ophoven is completely changing course and saying, oh, 15:12:41  
24 this is not six hours before death, now it's going to be days. 15:12:44

25 She has evidence of trauma -- again, in the same report, 15:12:49

1 she says she has evidence of trauma in the genital region 15:12:56  
2 consistent with penetrating sexual injury of indeterminate age. 15:13:00

3 This injury is a disruption or laceration of the tissue. 15:13:03

4 It cannot be determined how or when this injury occurred. 15:13:07

5 So now Dr. Ophoven, in 2010, is saying, "I have no idea 15:13:11  
6 when this injury occurred, I simply can't determine the date." 15:13:16

7 I think this shift is so important, I put side by side for 15:13:19  
8 the Court to see, from the 2002 and 2009 reports to the 2010 15:13:26  
9 report: The presence of genital trauma without evidence of 15:13:30  
10 ejaculate leaves only the conclusion that the child suffered 15:13:34  
11 acute injuries, most probably penetrating, shortly before her 15:13:37  
12 death; then, now, sometime days, or perhaps longer, before her 15:13:41  
13 death. 15:13:46

14 Then at the hearing -- and this is getting right to Your 15:13:50  
15 Honor's question -- Ophoven opined that the injury was weeks 15:13:53  
16 old. 15:13:57

17 This is Dr. Ophoven's testimony from the hearing. The 15:13:57  
18 question is: So just to make sure I understand, there is an 15:14:04  
19 injury that's older, that's what you're saying. Yeah, the 15:14:06  
20 wound that's unhealing (phonetic), that's weeks old. And then: 15:14:10  
21 I can't say that she had -- that she had been sexually misused 15:14:13  
22 multiple times, for instance. 15:14:18

23 And I am going to talk about that here momentarily. 15:14:19

24 THE COURT: And I'm happy to hear that, but I don't 15:14:24  
25 want you to forget some the other questions, because you've got 15:14:27

1 less than 10 minutes left.

15:14:30

2 MR. BRACCIO: Okay. Getting back to this. I will  
3 answer those questions.

15:14:31

4 There is no evidence in this record that Rachel ever  
5 complained to anyone about this vaginal injury, which was  
6 extraordinarily severe. This was half-an-inch in length and  
7 three-sixteenths deep, and there is nothing in the record to  
8 indicate that she ever said to anyone that she was in pain.

15:14:33

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15:14:53

15:14:59

15:15:02

15:15:05

15:15:06

15:15:08

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15:15:13

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15:15:17

15:15:17

15:15:19

15:15:21

15:15:24

15:15:27

12 In fact, I think Jones' current counsel walked her into  
13 some extraordinary positions.

14 They asked her:

15 Can you say anything about the age of the injury --  
16 this is the vaginal injury -- based upon these slides?

17 Answer: Weeks.

18 Weeks?

19 Yeah. This injury, this wound --

20 Yes.

21 -- began weeks prior.

22 Is it possible that this wound would have predicated  
23 when Mr. Jones began living with Rachel Gray and her family,  
24 which was just a few weeks before her death?

25 Yeah, it's possible.

1 They were living with Jones in the weeks before. The 15:15:29  
2 undisputed evidence in this record is that they moved in with 15:15:33  
3 Jones at the beginning of April and lived with him for at least 15:15:36  
4 a month. So even saying that the injury's weeks old doesn't 15:15:39  
5 predate them living with Jones. 15:15:43

6 And I think this also gets to Your Honor's Point. Ophoven 15:15:49  
7 admitted that there could be a newer injury. This is her 15:15:52  
8 testimony: 15:15:56

9                   Do you recall at the time telling me that you                   15:15:56  
10                 couldn't exclude a fresh trauma to the vagina?                15:16:00

11                   No, I couldn't, but what I was answering to you -- 15:16:04  
12 and I believe I already said that direct -- I couldn't say that 15:16:06  
13 somebody didn't reinjure her or didn't cause newer bleeding or 15:16:08  
14 trauma. 15:16:12

15 Ophoven is saying there is a newer injury, which does not 15:16:15  
16 exclude Jones. 15:16:19

17 Dr. Keen also said the exact same thing about the vaginal 15:16:23  
18 injury. He said that he saw evidence of a newer vaginal injury 15:16:27  
19 superimposed on an older injury. 15:16:33

20 Staying on the topic though of the vaginal injury, I 15:16:36  
21 think you had told us at your interview, do you recall saying 15:16:39  
22 that you saw evidence of a new injury superimposed on that old 15:16:45  
23 injury? 15:16:46

24 Yes, you see that. You see that when you actually 15:16:48  
25 look at the gross photographs, you can draw that conclusion 15:16:52

1 from the character of the laceration that's occurring on the 15:16:56  
2 floor of the vaginal vault there. But when you look at it 15:16:59  
3 microscopically, you're seeing older things. 15:17:03

4 Question: So there is some sort of combination of an 15:17:07  
5 older healing injury and a more fresh injury. 15:17:09

6 In the vaginal. 15:17:13

7 In the vaginal. 15:17:14

8 Yes. 15:17:15

9 Can you tell how fresh that new bleeding is, when 15:17:15  
10 that would have occurred? 15:17:18

11 I can't really. 15:17:19

12 You just know that it's more recent than the older. 15:17:20

13 Yes. 15:17:23

14 So you agreed, I think, before that there is evidence 15:17:24  
15 of repeat trauma to Rachel's vagina. 15:17:27

16 Repeat injury. I think I chose "injury" as opposed 15:17:30  
17 to "trauma." 15:17:36

18 So Dr. Keen is also saying that there is a recent vaginal 15:17:37  
19 injury to Rachel. Thus, Dr. Keen cannot rule out Jones as 15:17:41  
20 having committed the sexual assault. 15:17:41

21 None of this evidence from Drs. Ophoven, McKay, or Keen 15:17:41  
22 established prejudice because they cannot exclude him as the 15:17:41  
23 assailant. To the contrary, they support Jones' convictions. 15:17:54

24 This is the eyewitness -- let me turn my attention to the 15:17:58  
25 Court's other questions, I want to make sure I answer those. 15:18:01

1 THE COURT: You have six minutes left. 15:18:05

2 MR. BRACCIO: Okay. 15:18:06

3 Law enforcement's investigation. 15:18:07

4 I think there's been a lot of accusations that they didn't 15:18:08  
5 follow through or anything. I think, to step back and actually 15:18:11  
6 look at the investigation, the day after this death occurs, 15:18:14  
7 Jones' ex-wife shows up and tells the police that Jones 15:18:18  
8 violently assaulted his own children. And there's an order of 15:18:22  
9 protection in the record before this Court supporting that, as 15:18:25  
10 well as her statements in the interview. 15:18:28

11 In addition, Rachel's own statements were that Jones "did 15:18:31  
12 this to me." He hit me with the metal shoe bar, or the metal 15:18:35  
13 shoe horn. So we have the victim in this case pointing out who 15:18:41  
14 her attacker is. 15:18:45

15 And when they go to interview Jones, they start to 15:18:47  
16 understand that he's telling all kinds of lies about having 15:18:50  
17 sought out medical care for Rachel. 15:18:53

18 And I think this also gets back to the fatal neglect as 15:18:55  
19 well. 15:18:58

20 When it's, well, did Jones really know? Everybody who came 15:18:58  
21 into contact with this child on Sunday saw her gravely hurt. 15:19:01  
22 They all told Jones: You need to take her to the hospital. 15:19:05  
23 And Jones said: Oh, I will. And then Jones takes her back and 15:19:09  
24 puts her down for a nap. And then Jones lies to everybody and 15:19:13  
25 says: Oh, I've had her medical evaluated already and they've 15:19:16

1 determined that she's fine.

15:19:19

2 So not only is Jones not seeking help for Rachel, he is  
3 affirmatively dissuading multiple other people from actually  
4 getting her the help that she needed.

15:19:24

15:19:27

5 So that's the law enforcement investigation. They focused  
6 on Jones because the evidence overwhelmingly pointed to him  
7 immediately.

15:19:30

15:19:34

15:19:38

8 I hope I've answered the Court's questions on the Arizona  
9 non-unanimous jury law that any trial juror convicted Jones of  
10 felony murder. The jury convicted him unanimously on each  
11 predicate offense unanimously. They convicted him unanimously  
12 on each one of those predicates.

15:19:38

15:19:44

15:19:48

15:19:52

15:19:56

15:19:58

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15:20:09

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15:20:41

15:20:45

13 Does count four satisfy the Enmund-Tison standard? That's  
14 a very good question.

15:19:58

15:20:05

15:20:06

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15:20:41

15:20:45

1       acted with reckless indifference and was a major participant in 15:20:56  
2       the underlying felony, and the *Tison* finding alone can stand. 15:21:00

3           And finally, the Court: Why was it not deficient 15:21:04  
4       performance of Jones' post-conviction counsel to request 15:21:08  
5       funding for an investigator under the wrong rule? 15:21:11

6           Very glad the Court asked this question. I didn't get a 15:21:15  
7       chance to squarely address this in my briefing. 15:21:18

8           Again, the standard is objective reasonableness. 15:21:21

9           We have to look at what was before the PCR counsel, before 15:21:24  
10      Judge Hazel at that time. And on the record before him, he saw 15:21:27  
11      that Bruner and Bowman had sought out an independent medical 15:21:30  
12      pathologist, they had run down some of these injuries, these 15:21:33  
13      injuries were all consistent. 15:21:37

14           He looked at the record and found that there was no need to 15:21:39  
15      conduct additional investigation and to essentially go expert 15:21:42  
16      shopping for that. 15:21:45

17           He testified he reviewed the whole file. 15:21:46

18           He testified specifically that it didn't matter what rule 15:21:48  
19      he would have cited to the Court at that time. The practice in 15:21:52  
20      Pima County in 1994 and '95, and a couple years afterwards, was 15:21:55  
21      that they weren't given him funding. 15:21:59

22           So what he testified to in this hearing was that he 15:22:01  
23      conducted his own investigation, and his claims were 15:22:03  
24      successful, they were colorable, he achieved an evidentiary 15:22:07  
25      hearing on several of them. 15:22:09

1 I also believe the record shows -- 15:22:11

2 THE COURT: I shouldn't be concerned that he couldn't 15:22:13  
3 even cite the right authority for making the request? 15:22:17

4 MR. BRACCIO: No, I think that's -- I think that's 15:22:19  
5 poor. He should have cited the right rule. But, again, his 15:22:21  
6 testimony was it didn't matter what rule I cited to the 15:22:24  
7 Court -- 15:22:27

8 THE COURT: But then didn't the Court -- didn't I come 15:22:28  
9 back and say he didn't provide supporting information? 15:22:29

10 MR. BRACCIO: Yeah. 15:22:31

11 THE COURT: Isn't that a problem? 15:22:31

12 MR. BRACCIO: I think his testimony was that "I didn't 15:22:35  
13 know what I needed to look for, absent an investigator. So 15:22:36  
14 until I --" 15:22:39

15 THE COURT: So what is it, a Catch-22? 15:22:40

16 MR. BRACCIO: You know, he should -- you know, I can't 15:22:42  
17 speak to -- I don't think it was a Catch-22. He said he 15:22:45  
18 testified in this hearing that he did his own investigation. I 15:22:49  
19 think he was the first to obtain an interview with Angela Gray. 15:22:52

20 So I think he did do a sufficient job. 15:22:57

21 And I think for purposes of this hearing and what the Court 15:23:01  
22 needs to be concerned about, this is *Detrich*, from the Ninth 15:23:03  
23 Circuit. This is -- we're just looking through what PCR 15:23:08  
24 counsel did. I think he did an objectively reasonable job in 15:23:11  
25 the PCR, but essentially their claim is that it's grounded in 15:23:15

1 all the claims that they've raised about trial counsel. 15:23:18

2 THE COURT: No, I understand that. 15:23:21

3 MR. BRACCIO: Yeah, so if they can prove that any of 15:23:21

4 the trial counsel claims had merit, then he probably was 15:23:23

5 ineffective for failed to having raise that claim. I think 15:23:27

6 it's probably that simple. 15:23:31

7 THE COURT: Forty-five seconds. 15:23:31

8 MR. BRACCIO: Okay. Let me see if I can do it. 15:23:32

9 I do want to talk about Dr. Howard's statements. 15:23:34

10 THE COURT: Start talking. 15:23:37

11 MR. BRACCIO: He were go. Here were Dr. Howard's 15:23:40

12 statements about the small bowel duodenal injury. 15:23:47

13 In his defense pretrial interview, he stated: This 15:23:49

14 inflammatory response is a matter of at least hours, perhaps a 15:23:52

15 day, hours to a day, progressively worsening. 15:23:56

16 Angela Gray's trial, I'm going to hit the highlights here. 15:23:59

17 One day prior to death. Twenty-four hours prior to death. 15:24:02

18 Findings are most consistent with that. Several hours, perhaps 15:24:06

19 12 hours, to get the degree of inflammation, that's 15:24:09

20 conceivable. He was asked: It would be from 12 hours on up 15:24:14

21 to, say, 24 to 36 hours? Answer: Yes. 15:24:16

22 Barry Jones' trial, what did he tell the Barry Jones jury? 15:24:20

23 Based upon the autopsy, the injury is typical of having 15:24:25

24 occurred about one day prior to death. This typical one-day 15:24:28

25 approximation included the head laceration, genital injuries, 15:24:32

1 and external bruises. He was asked: Is this consistent with 15:24:35  
2 having occurred between 2:00 and 5:30 or 6:00 o'clock on May 15:24:39  
3 1st? He testified: Any time on the 24 hours prior to that 15:24:45  
4 would be consistent, so that time would be possible. 15:24:49

5 THE COURT: All right. We're going to have to end it 15:24:51  
6 there. You're over time. 15:24:53

7 MR. BRACCIO: Thank you Your Honor. 15:24:55

8 THE COURT: Thank you, very much. 15:25:00

9 MR. SANDMAN: How much time do I have? 15:25:18

10 THE COURT: You have 11 minutes and 55 seconds. 15:25:20

11 MR. SANDMAN: Let me quickly go back to question one, 15:25:23  
12 where we started this afternoon. 15:25:26

13 Your Honor, you'll read the closing argument, I am 15:25:27  
14 sure, and you will find that the answer to your first question 15:25:31  
15 for both counsel, the answer is no. 15:25:36

16 The prosecutor never ever said to the jury "even if 15:25:39  
17 you find him not guilty of this, then he's guilty of that." 15:25:45  
18 It's not in there. 15:25:50

19 Secondly, Mr. Braccio pointed out the verdict form 15:25:51  
20 where the jury found him guilty. But they found him guilty of 15:25:56  
21 intentional and knowing child abuse. 15:26:00

22 The whole question now, in light of the fact that we have 15:26:01  
23 evidence that Mr. Jones is not the perpetrator, there are other 15:26:04  
24 boxes on the verdict that says negligent or reckless. And my 15:26:08  
25 contention is -- is to get from intentional to negligent, where 15:26:13

1 we want to be, or below negligent. But we want to get away 15:26:18  
2 from intentional or knowing. To get there, the lawyers have to 15:26:22  
3 prove he is not the killer, he is not the person who assaulted 15:26:26  
4 the child; and to do that, they have to present medical 15:26:28  
5 evidence. They've got to do all those things to show it wasn't 15:26:34  
6 him. 15:26:38

7 THE COURT: Because it's the -- him being the 15:26:38  
8 perpetrator puts him on notice of the severity of the 15:26:42  
9 injuries -- 15:26:45

10 MR. SANDMAN: That gets you to intent. And if he's 15:26:45  
11 just -- I mean, you saw pictures of Barry Jones, you saw his 15:26:48  
12 trailer. If he just doesn't have it together and he's making 15:26:53  
13 horrible decisions but is not the killer, then it's a lower 15:26:56  
14 class of crime, it's not a murder case. 15:27:00

15 Mr. Braccio failed to read to you -- after reading a 15:27:03  
16 number of pages from the closing argument, he failed to read 15:27:06  
17 this from Page 104, Line 21 through Page 105, 2. Quote: Only 15:27:09  
18 the defendant knew how badly she was hurt. Only the defendant 15:27:16  
19 had the means of taking the baby to the hospital; but for 15:27:20  
20 obvious reasons he could not, so he let her die. 15:27:24

21 And that's how they intertwined -- they got to the 15:27:27  
22 mens rea they needed to get to. 15:27:33

23 In any event, I want to move on to another issue: 15:27:36  
24 Dr. Keen. 15:27:41

25 Your Honor, your recollection was correct. When 15:27:44

1 Dr. Keen testified on October 31st, at Pages 71 and 73, he 15:27:49  
2 reiterated that he would have needed to have reviewed the 15:27:55  
3 slides to make any assessment, reliable assessment, of when the 15:27:58  
4 injuries took place. 15:28:03

5 Dr. Keen is not the one to blame for not looking at 15:28:05  
6 the slides. As I said, on a more -- 15:28:08

7 THE COURT: Isn't it conceivable though, if I 15:28:10  
8 understand the respondent's argument, that he could have, in 15:28:12  
9 that telephone conversation with counsel, discussed it and said 15:28:17  
10 you're barking up the wrong tree? 15:28:22

11 MR. SANDMAN: The answer is no. 15:28:27

12 THE COURT: Which obviated the need to send the 15:28:28  
13 slides? 15:28:32

14 MR. SANDMAN: Based on the evidence before this Court, 15:28:33  
15 Dr. Keen testified that he would have told counsel that he 15:28:35  
16 could not reliably -- and this is also in his declaration, 15:28:39  
17 which is an exhibit: I would have told the lawyers I could not 15:28:44  
18 reliably date the injuries without looking at the physical 15:28:47  
19 evidence. 15:28:50

20 That's the testimony. 15:28:51

21 So I don't think, based on that uncontradicted record, that 15:28:52  
22 we can presume that Dr. Keen said something else. 15:28:56

23 It's pretty standard. 15:28:59

24 As I noted earlier, Mr. Bruner told Judge Carruth he needed 15:29:04  
25 someone to look at the slides. Dr. Howard was looking at 15:29:09

1 slides. Everybody -- they knew that that had to be done, and 15:29:12  
2 they did not do it. 15:29:15

3 Dr. Ophoven. Her 2010 report, consistent with her 15:29:19  
4 testimony, indicates that she did apply additional standing to 15:29:26  
5 the anogenital tissues, and it indicated substantial healing, 15:29:31  
6 not consistent with a fresh penetrating injury. And then she 15:29:36  
7 went on to say it didn't happen within the few days before her 15:29:41  
8 death. 15:29:45

9 And on the final page of her three-page report, which is 15:29:45  
10 Exhibit 106, I am looking at now, she said that the injury to 15:29:48  
11 the vagina shows evidence of healing. 15:29:59

12 Then when she testified, you asked her some questions about 15:30:01  
13 this specifically. And she said -- this was at Page -- I 15:30:06  
14 believe Page 70. 15:30:12

15 Your Honor, when you questioned her, she said there was no 15:30:14  
16 retraumatizing to the point where there was a retear. That 15:30:17  
17 tear was old. It certainly didn't happen on May 1st, 1994. 15:30:22  
18 And she couldn't exclude the fact that somebody might have 15:30:29  
19 stuck something in her on that Sunday. But the point is that 15:30:33  
20 tear is old; not as the jury at Mr. Jones' trial was told, that 15:30:40  
21 it was all new. 15:30:46

22 She said that was a healing injury and that bleeding might 15:30:49  
23 be due to DIC. Quoting her: There was no retraumatizing to 15:30:51  
24 the point where it was retorn. The wound is unhealing and 15:30:55  
25 weeks old. 15:31:00

1       That's a far cry from what Mr. Jones' jury was told, that           15:31:05  
2       the vaginal tear occurred on Sunday. This injury, she said,           15:31:09  
3       potentially goes back weeks.   15:31:13

4       And then Dr. Keen looked at the same slides and said that           15:31:14  
5       it was not new, and that -- some of the hemorrhaging he related   15:31:18  
6       to sanitary and hygiene. And he didn't relate anything to --   15:31:23  
7       he thought it could have been reinjured, he said, but not      15:31:29  
8       retraumatized.   15:31:33

9       That's an old injury. And this case was not tried on the           15:31:36  
10       theory that there was some old injury and she was touched by   15:31:41  
11       Mr. Jones on Sunday. That wasn't the case.                          15:31:46

12       There was a brief reference to Rachel's statements, which           15:31:49  
13       of course were not presented to Jones' jury. And they're not   15:31:54  
14       appropriate to be -- they were excluded from the trial, the   15:31:58  
15       jury never heard them, and they're not appropriate to be      15:32:01  
16       considered here.   15:32:04

17       As for Mr. Hazel, according to Mr. Cooper and Ms. Bowman   15:32:04  
18       and Mr. Bruner, there was money to go around if you knew how to   15:32:14  
19       ask for it, number one. Number two, if Mr. Hazel thought that   15:32:17  
20       he wasn't going to get money and that was a fait accompli, an   15:32:22  
21       effective lawyer makes a record. And Mr. Cooper testified     15:32:27  
22       about this.   15:32:29

23       Even without Mr. Cooper's testimony, it's obvious that if I   15:32:31  
24       think, Your Honor, you're not going to give me money, I'm going   15:32:36  
25       to make a super record about why I need that money for my      15:32:41

1 indigent client. Otherwise I've kept it a secret, I'm not 15:32:45  
2 going to try, and then we don't get any funding, I have nothing 15:32:50  
3 to appeal. I mean, an effective lawyer always makes a record 15:32:53  
4 with respect to his needs. 15:32:57

5 Mr. Hazel testified that he had plenty of information in 15:33:01  
6 front of him that would have warranted the request for a 15:33:04  
7 medical expert. He never asked for that. He asked for an 15:33:07  
8 investigator. 15:33:11

9 So I think the record is clear that Mr. Hazel was anything 15:33:12  
10 but effective (sic). Ineffective. Excuse me. 15:33:18

11 I have a couple of extra seconds, so let me go back to 15:33:33  
12 question one again on count four. 15:33:38

13 Mr. Braccio argued, and they argued in their briefs, that 15:33:39  
14 somehow you're bound by the jury verdict that they found intent 15:33:42  
15 and knowing conduct. That is not true. 15:33:45

16 Obviously, that mens rea determination was affected by the 15:33:47  
17 ineffective assistance of trial counsel. They don't 15:33:54  
18 make the -- our contention is they don't make the intentional 15:33:57  
19 and knowing finding when they find out Mr. Jones didn't do any 15:34:01  
20 of this. 15:34:03

21 So you're not bound by anything in the verdicts of this 15:34:03  
22 jury. That's the whole point of this proceeding. If the 15:34:08  
23 ineffective assistance reached the case and we've demonstrated 15:34:11  
24 that, then that verdict doesn't stand. 15:34:17

25 So I think, with that, Your Honor -- 15:34:20

1                   THE COURT: What about the argument that Dr. Howard in 15:34:22  
2 fact didn't testify inconsistently between Angela Gray's trial 15:34:26  
3 and Mr. Jones' trial? 15:34:32

4                   MR. SANDMAN: Well, I mean, Judge, I believe that I 15:34:35  
5 demonstrated unequivocally when Dr. Howard was on the stand 15:34:37  
6 that he changed his testimony. We cited in our briefs his 15:34:42  
7 admission that his testimony was different. The lawyers are 15:34:45  
8 arguing that his testimony wasn't different, Dr. Howard 15:34:51  
9 testified that it was. That's in the record. And I can't give 15:34:55  
10 you the pin cite to that. We've cited that in our briefs and 15:34:58  
11 it's in the record and he acknowledged it. 15:35:01

12                  And you can't testify at the Gray trial that the injury is 15:35:05  
13 most consistent with 24 hours before death and then show up in 15:35:08  
14 front of Mr. Jones' jury and you're asked the same question and 15:35:12  
15 you gave a different answer. 15:35:16

16                  Now, I understand the argument they're playing around with 15:35:17  
17 days; that he always said, well, it could have been a day here 15:35:20  
18 or two days there. But that's not the point. He said the 15:35:24  
19 injury was most consistent at a time when my client didn't have 15:35:27  
20 care and custody of that child. He said that both with respect 15:35:31  
21 to the vaginal injury and the bowel injury. And then the scalp 15:35:34  
22 injury, he changes that testimony at the Gray trial from 15:35:38  
23 several days the wound would have been painful, to, no, it 15:35:43  
24 happened Sunday afternoon. 15:35:46

25                  So I understand people can read things differently, but I 15:35:48

1 don't think it's reasonable to suggest that his testimony was 15:35:56  
2 not different and that it did not ultimately mislead Mr. Jones' 15:35:58  
3 jury. 15:36:03

4 THE COURT: Thank you. 15:36:06

5 All right. I will take this matter under advisement. 15:36:08  
6 I'll be in touch. You'll get my decision. Thank you. 15:36:14

7 MR. BRACCIO: Judge, do you want a copy of our 15:36:18  
8 PowerPoint presentation? We sometimes file those with the 15:36:20  
9 Court if it's helpful. 15:36:22

10 THE COURT: Well, you know, I think I am going to rely 15:36:25  
11 on what was argued here today, because this hasn't really been 15:36:31  
12 filed as an exhibit in this case. But, thank you. 15:36:36

13 (Proceedings concluded at 3:36 p.m.)

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C E R T I F I C A T E

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3           I, A. TRACY JAMIESON, do hereby certify that I am  
4 duly appointed and qualified to act as an Official Court  
5 Reporter for the United States District Court for the District  
6 of Arizona.

7           I FURTHER CERTIFY that the foregoing pages constitute  
8 a full, true and accurate transcript of the proceedings  
9 contained herein, held in the above-entitled cause on the date  
10 specified therein, and that said transcript was prepared by me.

11           Signed in Tucson, Arizona, on the 9th day of March,  
12 2018.

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s/A. Tracy Jamieson

A. Tracy Jamieson, RDR, CRR

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